CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 415

HEINEL MOTORS, INC., AND ELMER W. HEINEL,
Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN E. SHERIDAN,
SAMUEL I. SACKS,
Counsel for Petitioners.

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Emergency Price Control Act, Section 205 (e) (56 Stat. 23, 50 U. S. Code App. Supp. II, Sec. 901, et seq., as amended by the Stabilization Extension Act of 1944 (58 Stat. 632, 50 U. S. Code App. Supp. 925 (e), and as further amended by the Amendment of 1944, Sec. 108 (b) and (c) 2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD DISTRICT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Heinel Motors, Inc., and Elmer W. Heinel, respectfully petition that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in this case on June 13, 1945.

A

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 13, 1945. The jurisdiction of this Court is

involved under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A., Sec. 347(a).

B

Statement of the Matter Involved

This case comes before this Court from the Third Circuit Court of Appeals which on June 13, 1945, 149 F. 2d 815 affirmed the opinion of Kirkpatrick, J., of the United States District Court for the Eastern District of Pennsylvania, 59 F. Supp. 759 (1944).

It involves a suit by the Price Administrator for an injunction and treble damages under Section 205(e) of the Emergency Price Control Act (56 Stat. 23, 50 U. S. Code App. Supp. II, Sec. 901 et seq.) and its Amendment by the Stabilization Extension Act of 1944 (58 Stat. 632, 50 U. S. Code App. 925(e)) for alleged violation of Maximum Price Regulation No. 341, effective April 26, 1943 (8 Fed. Reg. 3970), and Revised Maximum Price Regulation No. 341 effective August 16, 1943 (8 Fed. Reg. 11176), dealing with the sale of used commercial vehicles.

The case was tried by Kirkpatrick, J., of the District Court, without a jury, who granted the injunction and awarded damages for the amount of the overcharge in an opinion cited above and set forth in the record page 181a.

The Administrator's complaint was as follows:

1. That the defendant sold used trucks in excess of the above price regulations;

2. That the defendant did not have tags attached to the trucks showing the make-up of these prices;

3. That the defendant did not furnish written guarantees.

The Administrator therefore claimed that all of the used trucks were sold on an "as is" basis. The defendant con-

tended that it sold all of the said trucks with the exception of one on a "guarantee" basis; that it tried to comply with the regulations but that lack of clerical help prevented it from so doing, and further that the prices as fixed as of April, 1943, were unreasonable and confiscatory and that the Administrator, recognizing the claim, did make a substantial increase in prices of used trucks on August 10, 1943, effective August 16, 1943.

It will be noted that all the transactions involved occurred within two months of that date.

At the trial, the Administrator offered the testimony of twelve of the purchasers. He showed that the sales orders were made out on an "as is" basis. However, a number of his witnesses admitted that they purchased these used trucks under a "guarantee" basis, and even the Administrator admitted such sales in three instances.

The Government regulations called for a thirty day or 1000 mile guarantee. Defendant offered a ninety day or 4000 mile guarantee.

The Government's witnesses, who were frank, all admitted that they did buy the used trucks on a "guarantee" basis. All of the other witnesses, under cross-examination, admitted that they saw the defendant's guarantee or that it was explained to them and all took advantage of this guarantee.

Sales No. 2, LaTore (65a); No. 9, Webster (117a); and No. 10, Western Maryland (46a) were admitted as "guarantee" sales.

For evidence admitting knowledge of defendant's guarantee in the other sales, see the following:

No. 3 Beyer ..... (26a)
No. 4 LaMonaco ..... (71a)
No. 13 Gayer ..... (77a)
No. 1 Fizell ..... (92a)

No. 5 Rauch .....(100a)
No. 7 Brandt .....(113a)
No. 8 Miller .....(116a)
No. 12 Leslie .....(125a)

The remarkable thing in this case is that of the twelve witnesses, not one made a complaint with regard to their purchases of the used trucks from the defendant. All were satisfied. All who brought their trucks back for repair under the guarantee had the work done either without charge or at the one-half price stated in the guarantee. In one instance, where the work was done outside, the defendant reimbursed the purchaser with its share of the cost thereof. The only car sold on an "as is" basis was No. 11—Aerated Products Company (117a).

In order to expedite matters at the trial, the price basis on all of these cars was agreed upon with three exceptions; one was the age of the cars in nine instances; second was the cost of fish plates in No. 10—Western Maryland; and third was whether the sales were on an "as is" or "guarantee" basis.

In its defense, the defendant showed that it advertised all of these cars in the newspapers under a guarantee basis and quoted the price therein (157a) and it was at these prices that the cars were sold to the various purchasers. Several purchasers admitted that they saw these newspaper offers. Defendant also showed that it was continuously broadcasting on the radio and at all times announced its guarantee policy (155a). A photograph of a large sign over the used car lot also gave the conditions of this guarantee (80a), i. e. 90 days or 4000 miles. All of the witnesses admitted seeing this sign or would not say they had not seen it.

To sustain the claim for an injunction, the Administrator offered the testimony of one of its investigators, Louis Slepin (142a). He testified that on April 10, 1944, he went to Heinel Motors, Inc., asked for a used truck and was shown the only one they had, at the extreme corner of the lot, which had a price on the windshield but had no ticket for the reason, as was testified by Elmer Heinel (168a) that the car was not ready for sale. Slepin admitted that the person who showed him this truck stated that "when you buy it we will give you a bill and we will guarantee it and everything else" (143a).

Defendant also contended that the Administrator could not sue for treble damages under Section 205(e) of the Emergency Price Control Act because the right lay in the purchasers. The Government contended that all these purchases were made in the course of trade or business.

At the conclusion of the trial, the Court entered judgment against the defendant, assessing damages in the amount of the overcharge determined by the Administrator and granted the injunction.

The Court then filed an opinion sustaining an order for judgment and practically found every point in favor of the Price Administrator.

Upon appeal to the Third Circuit Court, the judgment of the Court below was sustained.

C

Questions Presented

1. Cannot a trial judge exercise his equitable powers and deny damages on a suit by the Office of the Price Administrator against a used truck dealer for treble damages?

2. Was not the amount of the damages as found for the Office of the Price Administrator in this action against a

used truck dealer against the weight of the evidence, particularly as to whether the sales were made on an "as is" or "guarantee" basis?

3. Was not the finding of the trial judge as to the age of the vehicles involved against the weight of the evidence?

4. Is the sale of a used truck by an auto dealer to a merchant a sale "in the course of trade or business"?

D

Reasons Relied On for Allowance of Writ

The United States Circuit Court of Appeals for the Third Circuit in affirming the lower court has laid down the principles that:

(a) The trial court has no discretion in fixing the amount of damages under the Stabilization Act of 1944 (supra).

(b) That the sales of the used autos involved were made in the course of trade or business. Many other Federal Courts have held to the contrary and a decision by this Honorable Court will determine the question. If the said sales were not made in the course of trade or business, then the Administrator could not have instituted this suit.

(c) That the general rule of evidence was abrogated or limited by the Emergency Price Control Act, particularly with regard to whether the sales were on an "as is" or "guarantee" basis and as to proof of the ages of the respective trucks.

A supporting brief accompanies this petition.

Wherefore, your petitioners respectfully pray that a writ of certiorari issue to review the order of the United States Circuit Court for the Third Circuit, entered by

that Court in this case on June 13, 1945, and that the said order be reversed by this Honorable Court, and that your petitioners may have such other and further relief as this Honorable Court may deem proper.

Respectfully submitted,

JOHN E. SHERIDAN,
SAMUEL I. SACKS,
By SAMUEL I. SACKS,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

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No. 415

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Courts Below

The United States Circuit Court of Appeals, Third Circuit, did not deliver a written opinion. It merely affirmed the order of the Court below. 149 F. 2d 815.

The District Court of the United States for the Eastern District of Pennsylvania delivered an opinion (printed page 181a) which is reported in 59 F. Supp. 759 (1944).

II

Jurisdiction

The jurisdiction of this case is invoked under Sec. 240 (a) of the Judicial Code, as amended, 28 U. S. C. A.

III

Statement of the Case

A statement of the case appears under heading "B" of the Petition for Writ of Certiorari. In the interest of brevity, that statement is not now repeated, but is referred to with the request that it be considered as here incorporated by reference.

IV

Questions Presented

The questions specifically brought forward by the Petition for Writ of Certiorari appear under heading "C" of the petition. Again, in the interest of brevity, they are not now repeated, but are referred to with the request that they be considered as here incorporated by reference.

V

ARGUMENT

Summary of Argument

1. That a trial judge has discretion in fixing the amount of damages under the Emergency Price Control Act and its Amendment.

2. That the evidence justified that all but one of the autos involved were sold under a "guarantee" basis.

3. That the burden of proving the age of the autos was upon the Administrator.

4. That the sales of the trucks in the case were not "in the course of trade or business."

I. The Court May Use Its Equitable Powers

In Judge Kirkpatrick's opinion on the question of the amount of the judgment, he states as follows (185a):

> "The suit being by a government agency, any judgment is in the nature of a penalty. While the defendant has no real defense to the charges against it, it has a number of excuses which have a certain amount of merit and which, if I were free to do so, would induce me to enter judgment for a sum considerably less than the amount of the overcharge. Reluctantly, I have reached the conclusion that I have no choice in the matter and that the judgment must not be less than the overcharge."

It is submitted that the trial judge has equitable powers to enter judgment for any amount that he sees fit. This was definitely established in the *Hecht* case.

> In *Brown* v. *Hecht Co.*, 49 Fed. Supp. 528, the United States District Court for the District of Columbia held the issuance of an injunction against violators of the Emergency Price Control Act and of the regulations issued thereunder lay in the discretion of the trial court and where it appeared that the defendant had made an honest effort to comply with the Act and the regulations and was not charged with bad faith, and that any violation which occurred was due to error in interpreting the act or regulation and was not intentional negligence and that there was no reason to anticipate further violations, the injunction was denied.

This decision was appealed by the Price Administrator to the U. S. Court of Appeals for the District of Columbia. There that Court held in *Brown* v. *Hecht Co.*, 137 F. (2nd) 689, that

> good faith was no defense and if a violation was shown, an injunction was mandatory.

This is the same position Judge Kirkpatrick felt he was compelled to take.

The case was appealed to this Honorable Court and in *Hecht Co.* v. *Bowles,* 64 Sup. Ct. Rep. 587, in an opinion by Mr. Justice Douglas, it was held that there was no doubt of the petitioner's good faith and diligence and said (p. 591):

> "We agree that the cessation of violations, whether before or after the institution of a suit by the Administration is no bar to the issuance of an injunction under Sec. 205(a). But we do not think that under all circumstances the Court must issue the injunction or other order which the Administrator seeks."

He further said that

> "The qualities of mercy and practicability has made equity the instrument for nice adjustment and reconciliation * * *" (p. 592).

In concluding, he said:

> "The Administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility" (p. 592).

The Circuit Court was reversed and the action of the trial Judge upheld.

Since this decision in the *Hecht* case, a number of the lower courts have sustained this position, citing the *Hecht* case for authority.

As said by Judge Kirkpatrick, the Act is in the nature of a penal suit. This is true as far as the defendant is concerned and therefore should be strictly construed.

It is obvious that the trial judge does have equitable powers and therefore he can use his discretion and reduce the amount of the judgment to any sum which he deems proper.

II. The Amount of the Damages Should Have Been Fixed on a "Guarantee" Instead of on an "As Is" Basis and

III. Age of Vehicles

The chief points of difference as to the amount of damage between the Administrator and the defendant were first, the age applicable to each truck and second, whether a guarantee basis was to be used.

With regard to the age of the trucks, Sec. 1360.504 b provided prior to August 10, 1943:

That the age of the vehicle is to be determined:

> (1) The date of delivery of the vehicle when new to the person who purchased it if such date of delivery can be supported by original invoices or certified copies thereof; or
>
> (2) if the above is not available, then the first day of January of the year of the model was to be used.

(See opinion printed page 182a.)

In its opinion, the Court holds it against the defendant for not proving the age of the trucks in this manner. The burden of proof was on the plaintiff as the Administrator was seeking damages of the defendant. The Administrator did not show what efforts he had made to obtain original invoices or certified copies. Certainly, having the make and manufacturer's number and all other details of each of the trucks, this information could easily have been obtained. The Administrator merely relied on the presumptions indicated in the second method.

At the trial, when this developed, the defendant wired Lever Brothers from whom it had purchased these trucks and who were the original buyers. Lever Brothers wired back the dates of purchase of these trucks (163a). Certainly this was good evidence and if the Administrator failed to adhere to the regulations, he cannot insist that the

defendant do so. There is no contention that the information submitted by Lever Brothers was not correct. If the ages as given by the defendant are used, there is a substantial reduction in the damages on an "as is" or "guarantee" basis.

For the convenience of this Court, the defendant has set forth a recapitulation on Pages 177a to 180a inclusive. This tabulation shows any overcharges, using the Government's ages on the "as is" or "guarantee" basis and for the "as is" or "guarantee" basis, using the ages as established by the defendant. As will be noted in the summary, the differences are substantial.

As to whether to use the guarantee price or not depends upon whether the failure to attach a written guarantee deprives the defendant of his claim in this case. The evidence as previously stated and outlined in the record shows that three of the witnesses admitted having purchased under a guarantee basis. In these three instances, the Administrator accepts the "guarantee" prices, but refuses them in all other instances. Yet all the other purchasers admitted seeing the newspaper advertisements or hearing the radio or seeing the sign or taking advantage of the defendant's guarantee of three months or 4000 miles. Why the Administrator accepts three and not the others is a mystery. This point is commented upon by the trial judge in his opinion (182a).

It is submitted that the action of the defendant was made in good faith and that its feeling as to the original regulation MP 341 was affirmed when the revised MPR 341 was issued on August 10, 1943. The reasons given for the revision by the Administrator in the revised Regulation were substantially the contention of the petitioner.

It is again submitted that the preponderance of evidence as to the purchasers having knowledge of the guarantees

is in favor of the defendant and this is admitted by the Administrator when he accepted three such cases. Therefore, if there is to be any damages assessed against the defendant, equity and justice require that the lowest figure of $556.78 be adopted.

Possibly the trial judge had some such figure in mind when it said "* * * if I were free to do so, would induce me to enter judgment for a sum considerably less than the amount of the overcharge" (185a).

IV. Were the Sales Made in the Course of Trade or Business?

Section 205(e) of the Emergency Price Control Act provides as follows:

> "(e) If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or maximum prices, the person who buys such a commodity for use or consumption *other than in the course of trade or business* may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section, the payment or receipt for rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or maximum prices, and the buyer *is not entitled to bring suit or action* under this sub-section, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this sub-section may be brought in any court of competent jurisdiction and shall be instituted within one year after delivery is completed or rent paid."

Defendant admits that it agreed that all these purchases were made in the course of trade or business (23a). When agreed, it was thought that this meant that the purchasers used these trucks in their business. This point has been a great source of litigation. As an illustration in *Bowles* v. *Silverman,* (U. S. D. C., S. D.) 57 F. Supp. 990 it was held that a sale of farm equipment to a farmer for use in his farming operations is a sale in the course of trade or business and the exclusive right to sue for treble damages for violations of ceiling prices by the seller of such equipment is, therefore, vested in the Administrator.

To the same effect see *Speten* v. *Bowles* (U. S. C. C. A.—8th Cir.), 146 F. (2nd) 602. Certiorari denied, 65 S. Ct. 1023.

Yet, in our own District Court in the case of *Brown* v. *Malloy, OPA Opinions and Decisions,* Vol. 2, p. 2112, Judge Welsh held that the farmer buying farm machinery did not buy the same in the course of trade or business and that the interpretation of the Administrator was strained and illogical.

Bowles v. *Rogers,* 57 F. Supp. 987 (U. S. Dist. Ct. N. D. Ind.) held to the same effect as to farm tractors.

The Circuit Court of Appeals for the Seventh Circuit reversed this case in 194 F. 2d 1010.

Bowles v. *Whayne,* 60 F. Supp. 78 (1945) (U. S. Dist. Ct. W. D. Kan.) held to the same effect that sale of mining equipment to a mine for its use and not for resale was not a sale in the course of trade or business. Here all the cases pro and con are cited. The Price Administrator has appealed this case to the Circuit Court of Appeals for the Sixth Circuit where it is still pending as of No. 9992.

In *Bowles* v. *Seminole Rock and Sand Co.,* (U. S. D. C., Fla.) 59 F. Supp. 751, it was held that a sale of rock to a

railroad for use as ballast was not a sale in the course of trade or business for which the Administrator was entitled to maintain an action. There the Court said:

> "It makes no difference whether the ultimate consumer is the housewife purchasing a can of soup or the railroad purchasing a hundred thousand dollar Diesel engine."
>
> "As I construe the statute, the statute was aimed to give the ultimate consumer an action for three-fold damages * * * the object was two-fold. First, if the merchant or middleman in purchasing from the jobber or manufacturer was *particeps criminis* to the excessive charge, he could pass it down and would have been able to pass it down to the ultimate consumer, therefore, it would have been iniquitous to give him the right to recover three-fold damages when he was so deep in mud as the manufacturer in the mire; but the ultimate consumer had no place to pass it on and no temptation to pass it on, and therefore, the ultimate consumer is whom they mean 'in the course of trade or business.' They could have used more understandable language, but I construe it to mean 'ultimate consumer'."

Although the judgment in the above case was affirmed; on the above point, the U. S. Circuit Court of Appeals, Fifth Circuit 145 F. (2nd) 482, held the action was in the Administrator and not in the purchaser. This Honorable Court reversed the judgment in 65 S. Ct. 861, on other grounds.

It is admitted that the majority of the cases favor the Administrator. Yet this interpretation is forced when Section 4a of the act "Prohibition" is read. This section is quoted by the Administrator at Page 147a as follows:

> "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or

> hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity * * *."
>
> The Administrator then insists that "it is a crime for a person to buy a commodity in the course of trade or business above ceiling prices, and that they did not want to have merchants suing each other, because they are in pari delicto."

If, as the Administrator contends, the buyer and the seller are in pari delicto, then there is no explanation why the defendant was sued and not the buyers of these trucks. Certainly, if they were both guilty, both should have been sued and it is not even-handed justice to sue one party to an illegal transaction and not the other.

It would appear to be the better interpretation that "in the course of trade or business" means where persons in the same line of business buy or sell a commodity with which they are familiar and which is handled by them for profit.

As an illustration (20a) Mr. Beyer, who was a baker, would be familiar with the price of flour but would not be familiar with the price of trucks which he rarely purchased.

This view is also brought out in *Bowles* v. *Jos. Denunzio Fruit Co.* (U. S. D. C. W. D. Kan.) 55 F. Supp. 9. There it states that a purchaser who buys from a retailer for use or consumption may bring an action for treble damages for violation of the Emergency Price Control Act, but where a retailer buys from a wholesaler for re-sale in the course of trade or business and for use or consumption, the retailer has no right to bring a treble damage action, the right of action in such circumstances being vested solely in the Administrator.

It is certain that clarification is badly needed and now is the time to do so.

It is suggested that when "course of trade or business" is used, it means where two people deal on the same basis with a commodity of which both are familiar. Thus, in the sale of flour, in any transaction between the manufacturer, wholesaler, retailer or baker, none of these can sue for treble damages because they would know or should know that they were paying above ceiling prices and the transaction as to this merchandise was one where they were *particep criminis.*

Thus, one buying bread of a baker or a housewife purchasing flour from a grocery store could sue for treble damages in each case, because they were the ultimate consumer and they did not purchase for re-sale or profit and would not be familiar with the price of flour.

The same thing would apply in our case. If an ordinary person were to buy a used truck, he could sue for treble damages. If the same person bought the truck for use in his business, there should be no distinction and he too could sue. The reason is that he is not in the automobile business, is not familiar with prices or regulations, does not buy for re-sale or for direct profit and is the ultimate consumer.

It is upon this contention and the cases cited above that the defendant rests its argument that the Administrator cannot bring suit for treble damages. Note too, this situation is recognized in the Amendment to the Emergency Price Control Act of 1942, approved June 30, 1944, which provides that if the buyer does not bring suit within thirty days, then the Administrator may sue. See 1944 Amendment Sec. 108(b) and (c), which amends Section 205(e) of the Emergency Price Control Act of 1942 and which makes applicable the Amendment of June 30, 1944 to proceedings pending on that date.

In conclusion, it is submitted under the points raised above that either the case should be dismissed or referred back to the trial judge to determine what damages he deems just under the circumstances.

Respectfully submitted,

JOHN E. SHERIDAN and
SAMUEL I. SACKS,
By SAMUEL I. SACKS,
Counsel for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 415

HEINEL MOTORS, INC., AND ELMER W. HEINEL, PETITIONERS

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. 190) is reported in 149 F. 2d 815. The opinion of the District Court (R. 181a) is reported in 59 F. Supp. 759.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 191) was entered on June 13, 1945. The petition for a writ of certiorari was filed September

10, 1945. Jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. Code 347 (a).

STATUTES AND REGULATIONS INVOLVED

The case involves Section 205 (e) of the Emergency Price Control Act of 1942 [1] as amended by Section 108 of the Stabilization Act of 1944 (58 Stat. 640, 50 U. S. C. App., Supp. IV, Sec. 925 (e)) and two regulations issued under Section 2 (a) (50 U. S. C. App., Supp. IV, Section 902 (a)) of the former Act, namely, Maximum Price Regulation 341 (8 F. R. 3971) and Revised Maximum Price Regulation 341 (8 F. R. 11176). For convenience the Emergency Price Control Act is hereinafter referred to as the Act, Maximum Price Regulation 341 as the original regulation, and Revised Maximum Price Regulation 341 as the revised regulation. The relevant provisions of the Act and the regulations are printed in the Appendix, *infra,* pp. 10–18. Both regulations established maximum prices for used commercial vehicles. The original regulation was issued on March 31, 1943 and became effective on April 26, 1943. It continued in effect until August 16, 1943 when it was superseded by the revised regulation.

[1] 56 Stat. 34, 50 U. S. C. App., Supp. IV, Sec. 925 (e).

STATEMENT

The action was brought by the Price Administrator to restrain petitioners from violating the Emergency Price Control Act and to recover a judgment against them for statutory damages under the provisions of Section 205 (e) of the Act. After trial on the merits, the Court granted judgment in favor of the Administrator for $2,125.60, and enjoined petitioners from violating the Act. The Circuit Court of Appeals affirmed the judgment.

The facts are not in dispute. Petitioners sold eleven used commercial vehicles between July 9, 1943, and August 15, 1943, at prices in excess of those permitted by the original regulation, and two used commercial vehicles between August 16, 1943, and October 31, 1943, at prices in excess of those permitted by the revised regulation. All of the vehicles were purchased by buyers for use in their respective businesses but not for resale.

QUESTIONS PRESENTED

1. Whether, under Section 205 (e) of the Act, the district court, in its discretion, could have awarded a judgment for less than the amount by which the prices at which the vehicles were sold exceeded the maximum prices established by the respective regulations.

2. Whether the excess of the prices at which the vehicles were sold over the maximum prices

established by the respective regulations was $2,125.60, as the court held, or only $556.78, as the petitioners contend.

3. Whether the cause of action arising from the sale of the vehicles at prices in excess of those permitted by the respective regulations was, under Section 205 (e) of the Act, vested in the Administrator or in the respective purchasers.

ARGUMENT

The judgment of the court below is clearly right. It is not in conflict with the decision of any other appellate court, and it does not decide any question of sufficient importance to warrant its being reviewed by this court.

1. The district court, in awarding a judgment based upon the overcharges, indicated that if he had discretion under the statute, he would have entered judgment in a smaller amount. Petitioners' contention that under Section 205 (e) of the Act the district court in its discretion could have awarded a judgment for less than the amount of the overcharges exacted by petitioners is plainly untenable. The section provides that a seller who violates a maximum price regulation "shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the

court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation." The section thus unequivocally provides that if the defendant proves that the violation was neither wilful nor the result of a failure to take practicable precautions against the occurrence of the violation he shall be liable for the amount of the overcharge or overcharges exacted or $25 whichever is the greater. If the section is construed as petitioners contend that it should be construed, then if the defendant, as in this case, fails to prove the absence of wilfulness and the taking of practicable precautions the court might award judgment for less than the amount of the overcharge or overcharges or $25, whichever is the greater. Congress obviously did not intend such an absurd result. Moreover, the legislative history of the section shows beyond dispute that $25 or the amount of the overcharge or overcharges was intended to be the minimum recovery in all cases. See the report of the House Conferees on the Stabilization Extension Act of 1944 (H. Rep. No. 1698, 78th Cong. 2d Sess., p. 23) and

the statement of Senator Wagner, Chairman of the Senate Conferees (90 Cong. Rec. 6368, June 21, 1944) quoted in the Appendix, *infra*, p. 19. *Hecht Co.* v. *Bowles*, 321 U. S. 321, upon which petitioners rely in support of their contention that the court might in its discretion award judgment for less than the minimum prescribed by the section was a suit in equity brought under Section 205 (a) of the Act and obviously has no application to an action for damages under Section 205 (e) of the Act.

2. Petitioners' contention that the court below incorrectly computed the amount the overcharges is equally without merit. Both the original regulation (Sec. 1360.504, *infra*, pp. 12–13) and the revised regulation (Sec. 7, *infra*, p. 15) prescribed two sets of maximum prices, one set for used commercial vehicles sold "as is", and a higher set for used commercial vehicles sold on a guaranteed basis. Both regulations provided that higher set of prices might be charged only if the seller delivered to the purchaser a guarantee in writing in a prescribed form. The prices prescribed by both regulations decreased with the age of the vehicle. The revised regulation (section 7, *infra*, p. 15) provided that the age of the vehicle should be computed from model year of the vehicle as designated by the manufacture and the original regulation (section 1360.504, *infra*, pp. 12–13) provided that it should be computed from the date the vehicle was delivered new to

the first purchaser if that date could be supported by the original bill of sale or the original invoice or certified copies thereof, otherwise from the first day of January of the year in which the vehicle was manufactured. The court below held that the maximum prices for the vehicles sold by petitioners were those prescribed by the regulations for vehicles sold "as is" and that the age of each of the vehicles should be computed from the first day of January of the year in which it was manufactured. Petitioners contend that the maximum prices for the vehicles were those prescribed for vehicles sold on a guaranteed basis, and that the age of each of the vehicles should be computed on the date it was delivered to the first purchaser. These contentions are plainly untenable. No written guaranty was delivered by petitioners to the purchasers of any of the vehicles as required by the regulation. In fact, the contracts of sale covering the vehicles sold on a deferred payment basis contained express disclaimers of any warranty. (R. 87a, 107a, 122a.) Moreover, the guaranty which petitioners claim that they extended to the purchasers by means of radio and newspaper advertisements and signs over their place of business related only to certain specified parts of the vehicles (R. 79a, 155a) whereas the guaranty required by the regulations covered every part of the vehicles. Petitioners were not, therefore, entitled to charge

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the maximum prices prescribed by the regulations for cars sold on a guaranteed basis. The dates on which the vehicles were delivered new to the first purchasers were not shown by the original bills of sale, original invoices or certified copies thereof. The court, therefore, was clearly right in holding that the age of each vehicle should be computed from the first day of January of the year of its manufacture.

3. The rulings below that the statute gives the right of action to the Administrator and not to the purchasers are plainly correct. Section 205 (e), *infra,* pp. 10–11, permits the purchaser to bring suit where he "buys such commodity for use or consumption other than in the course of trade or business", and it further provides that the Administrator may bring suit if the purchaser "is not entitled * * * to bring the action". All the purchasers herein acquired the trucks for use in their businesses. Petitioners contend that the term "use or consumption other than in the course of trade or business" means use or consumption by an ultimate consumer even though in the course of trade or business, so long as there is no resale; and accordingly that the Administrator has the right of action only when the purchase is for resale. But obviously "in the course of trade or business" has a much broader meaning than "for resale", and the court below, together with all other appellate courts to which the issue has been presented

rightly so held. *Lightbody* v. *Russell,* 293 N. Y. 492, 58 N. E. 2d 508; *Bowles* v. *Rogers,* 149 F. 2d 1010 (C. C. A. 7th); *Speten* v. *Bowles,* 146 F. 2d 602 (C. C. A. 8th), certiorari denied, No. 999, 1944 Term; *Bowles* v. *Seminole Rock & Sand Co.,* 145 F. 2d 482 (C. C. A. 5th), reversed on another ground, No. 914, 1944 Term; *Bowles* v. *Glick Brothers Lumber Co.,* 146 F. 2d 566 (C. C. A. 9th), certiorari denied, No. 1213, 1944 Term; *Bowles* v. *Wayne Jones* (C. C. A. 10th), decided September 15, 1945, not yet reported.

The decision of the court below is correct and there is no conflict among the appellate courts. It is respectfully submitted that certiorari should be denied.

J. Howard McGrath,
Solicitor General.

George Moncharsh,
Deputy Administrator for Enforcement,
David London,
Acting Director, Litigation Division,
Albert M. Dreyer,
Special Litigation Attorney,
Office of Price Administration.

October 1945.

APPENDIX

1. Stabilization Extension Act of 1944 (Act of June 30, 1944, 58 Stat. 632, 50 U. S. C. App., Supp. IV, sec. 901 *et seq.*

Sec. 108 (b). Subsection (e) of section 205 of the Emergency Price Control Act of 1942, as amended, is amended to read as follows:

"(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 or more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occur-

rence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered."

Section 108 (c) The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations, occurring after

the date of enactment of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.

2. Maximum Price Regulation 341

§ 1360.504 Maximum Prices in General—(a) *Method of computing maximum price.* In determining the maximum price for any used commercial motor vehicle, the "base price" for such vehicle shall first be computed in accordance with § 1360.505. The allowable percentage factor, corresponding to the age of the vehicle, as defined in paragraph (b) of this section, shall then be ascertained from the table of percentages contained in paragraph (c) of this section. The maximum price shall be determined by multiplying such "base price" by such allowable percentage. However, when a vehicle is sold by a dealer on a reconditioned and guaranteed basis the maximum price may be increased as provided in § 1360.506 and in certain other cases the maximum price may be increased as provided in § 1360.507.

(b) *Method of determining age of vehicle.* For the purpose of this regulation, the term "age" means the following:

(1) *For a complete used commercial motor vehicle or the chassis only of a used commercial motor vehicle.* (i) The period measured from the month and year in which the chassis of the used commercial motor vehicle was delivered when new to a person who purchased it for use and not for purposes of resale, if such date of delivery

can be supported by original bill of sale or original invoice or certified copies thereof, or

(ii) If such evidence is not available, the period measured from the first day of January of the year by which the model and year of manufacture of the chassis of the vehicle is designated by its manufacturer, or

(iii) If that information cannot be ascertained, a period of more than 72 months.

* * * * *

(c) *Table of percentages corresponding to the age of the vehicle, by which the "base price" is to multiplied.*

Age:	Percent
Six mos. or less	90
More than 6 mos. to 12 mos	81
More than 12 mos. to 18 mos	73
More than 18 mos. to 24 mos	66
More than 24 mos. to 30 mos	59
More than 30 mos. to 36 mos	53
More than 36 mos. to 42 mos	48
More than 42 mos. to 48 mos	43
More than 48 mos. to 54 mos	39
More than 54 mos. to 60 mos	35
More than 60 mos. to 66 mos	32
More than 66 mos. to 72 mos	29
More than 72 mos	26

* * * * *

§ 1360.506 Reconditioned and guaranteed used vehicles sold by dealers—(a) *Maximum price.* For any used commercial motor vehicle which has been reconditioned by a dealer and which has been guaranteed by such dealer in accordance with paragraph (c) of this section, the maximum price applicable to the sale of such vehicle by the dealer shall be the sum of subparagraphs (1), (2) and (3), except that in no event shall the maximum price for such reconditioned and guaranteed

vehicle exceed the price determined by applying to the "base price," computed in accordance with § 1360.505, the applicable percentage set forth in paragraph (b) of this section. Furthermore, this special price is not available if the vehicle has been used or rented after completion of the reconditioning.

(1) The price determined by multiplying the "base price" computed in accordance with § 1360.505, by the appropriate percentage in the Table contained in paragraph (c) of § 1360.504;

(2) 5% of (1); and

(3) The prices of any parts, materials and services needed and supplied by the dealer in reconditioning the vehicle for the purpose of sale, including dismantling for purposes of inspection. These prices must not exceed applicable maximum prices for such parts, materials, and services, when supplied by the dealer in the course of a repair job for a regular customer.

* * * * *

(c) *Guarantee to be furnished to purchaser.* No vehicle shall be sold at a price determined in accordance with this section unless the dealer shall furnish the purchaser with a signed guarantee in the form set forth in § 1360.521, Appendix B. A dealer may grant an additional guarantee, but the maximum price shall not be increased thereby. A purchaser of such vehicle is advised to retain the guarantee furnished under this paragraph (c), as well as the sales invoice, for use in connection with a possible resale of such vehicle within one year of its purchase. (See § 1360.507 (a).)

3. Revised Maximum Price Regulation 341

§ 5 Maximum prices for used vehicles. Except for special cases provided for in section 9, to figure the maximum price of a used vehicle, the seller must

(a) Find the "base price" according to section 6; and

(b) Multiply such "base price" by the percentage in section 7 (a) applicable to the model year of the vehicle and the condition in which it is sold ("as is" or "warranted"). Before the percentage applicable to a "warranted" vehicle can be used the vehicle must be in the condition required by section 8 and the warranty stated in that section must be furnished to the purchaser.

* * * * *

§ 7 Percentage to be used in multiplying "base price" to obtain maximum price and the method for adjusting percentage to allow for depreciation—(a) *Table of percentages*—(1) *For a used vehicle or chassis.* For a used vehicle or a used vehicle chassis, the percentage to be used in multiplying the "base price" to obtain the maximum price shall not exceed the percentage stated in the following schedule which is applicable to the model year of the vehicle as determined by the manufacturer and the condition in which the vehicle is sold ("as is" or "warranted").

Model year	Percentages	
	"As is"	"Warranted"
	Percent	*Percent*
1943 and 1942 (sold new in 1943)	92	103
1942	85	97
1941	73	86
1940	63	78
1939	58	73
1938	55	70
1937	51	67
1936	46	62
1935	41	58
1934	37	54
1933*	33	50

*1932 and lower model year vehicles take the percentages applicable to 1933.

Where the manufacturer did not designate a model year for the vehicle when it was new, the year including the date when it was delivered new to the first purchaser for use shall be considered as the model year if such date of delivery can be substantiated by the motor or serial number or by the original bill of sale or original invoice. If such information cannot be obtained, the year 1933 shall be considered as the model year.

(2) *For a body of a used vehicle.* For a body of a used vehicle, the percentage to be used in multiplying the "base price" to obtain the maximum price shall not exceed the percentage listed in the schedule in subparagraph (1) which is applicable to the model year and the condition in which the body is sold ("as is" or "warranted"). The model year is the year of the original manufacture of the body or the model year 1933.

* * * * *

§ 8 "Warranted" used vehicle. (a) A "warranted" used vehicle, which includes a chassis or body sold separately, is one in good operating

condition for which the dealer furnishes the following warranty:

DEALER'S WARRANTY

The used vehicle described below is hereby warranted to be in good operating condition, and to remain in such condition under normal use and service for a period of 30 days after delivery, or 1000 miles, whichever may first occur.

We agree, if said vehicle is delivered during the above period to our place of business, to make with reasonable promptness any repairs or replacements which may be necessary to its good operating condition in accordance with normal use and service.

This warranty does not extend to tires, tubes, paint, glass, upholstery, or to any repairs or replacements made necessary by misuse, negligence, or accident.

Make of used vehicle_____ Model_____
Date of delivery_____ Speedometer reading_____
Serial or motor number _____
Total selling price $_____

_____
(Name of dealer making sale)

Per _____
(Name of proper representative thereof, and title)

_____
(Address)

(b) A dealer may extend to the purchaser warranties in addition to those provided in the warranty stated in paragraph (a), but this shall be done in a warranty separate and in addition to the warranty provided in paragraph (a), and the maximum price established by section 5 shall not be increased thereby.

(c) If any dealer shall fail to perform his obligations under the terms of the warranty provided in paragraph (a), he shall be deemed to have violated the provisions of this regulation to the extent that the price charged exceeded the price determined under section 5 for the used vehicle sold "as is."

4. H. Rep. No. 1698, 78th Cong., 2d sess., p. 23

SUITS FOR DAMAGES

Both the Senate bill and the House amendment rewrote subsection (e) of section 205 of the Emergency Price Control Act of 1942, the so-called treble-damage provision. The differences between existing law and the provision in the House amendment were explained in the report of the House Banking and Currency Committee.

By an amendment on the floor of the House the subsection was modified so that in addition to attorney's fees and costs the amount which could be recovered was the greater of the following: (1) Such amount not more than $50 or treble the amount of the overcharge or the overcharges whichever is greater, upon which the action is based as the court in its discretion may determine, or (2) $50. In the conference substitute this part of the subsection has been modified so that in

addition to attorney's fees and costs the amount which may be recovered is (1) such amount not more than three times the amount of the overcharge or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine. Under the first clause the buyer of the commodity would be entitled, of course, to recover a minimum of the amount of the overcharge, or the overcharges, for which the action is brought.

5. Statement of Senator Wagner (90 Cong. Rec., 6368, June 21, 1944)

Both the Senate and the House bills contained different amendments to subsection (e), reducing in appropriate cases the amount of damages recoverable thereunder. The original act set the damages at three times the amount of the overcharge or $50, whichever was the greater. The conference agreement is designed to provide a range of damages within which the court has discretion to determine the amount recoverable in a given case. The minimum limits of the range are the amount of the overcharge or $25, whichever is the greater. The maximum limits are three times the amount of the overcharge or $50, whichever is the greater. As under the original act, the seller is also liable for reasonable attorney's fees and costs.

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